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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

**NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION; THE  
COMMISSIONER OF THE NEW JERSEY  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION; and THE ADMINISTRATOR  
OF THE NEW JERSEY SPILL  
COMPENSATION FUND,**

**Plaintiffs,**

**v.**

**E.I. DU PONT DE NEMOURS AND  
COMPANY; THE CHEMOURS COMPANY;  
THE CHEMOURS COMPANY FC, LLC;  
AND “ABC CORPORATIONS” 1-10 (NAMES  
FICTITIOUS),**

**Defendants.**

**Case No.**

**NOTICE OF REMOVAL ON  
BEHALF OF E.I. DU PONT DE  
NEMOURS AND COMPANY**

**TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

Defendant, E.I. du Pont de Nemours and Company (“DuPont”) hereby removes the above-captioned case pursuant to 28 U.S.C. §1442 from the Superior Court of New Jersey, Law Division, Gloucester County to the United States District Court for the District of New Jersey. The grounds for removal are as follows:

**I. BACKGROUND**

1. This suit involves claims against DuPont for acts that were taken under the express authority and control of agencies and officers of the United States. It is thus removable under 28 U.S.C. § 1442(a)(1).

2. On August 27, 2019, Plaintiffs, the New Jersey Department of Environmental Protection, the Commissioner of the Department of Environmental Protection, and the Administrator of the New Jersey Spill Compensation Fund (collectively “Plaintiffs”) filed a Complaint in the Superior Court of New Jersey, Law Division, Gloucester County in a case captioned as New Jersey Department of Environmental Protection, et. al. v. E.I. du Pont de Nemours and Company, et. al., Case No. GLO-L-000388-19.

3. On May 31, 2019, Plaintiffs filed a First Amended Complaint against Defendants DuPont, the Chemours Company, the Chemours Company FC, LLC and “ABC Corporations” 1-10 (names fictitious). See a true and correct copy of the First Amended Complaint attached hereto as Exhibit “A.”

4. Plaintiffs served DuPont with the First Amended Complaint on June 10, 2019. DuPont was not served with the original Complaint at an earlier time.

5. In the First Amended Complaint, Plaintiffs claim, *inter alia*, that since 1880, DuPont engaged in the manufacture, storage, and transport of industrial chemicals and high explosive products at the Repauno site; and as a result, DuPont generated significant amounts of hazardous waste at Repauno, which include, but are not limited to, dimethyl terephthalate heels, aniline heavy waste oil, aniline tar heels, and waste nitrobenzene mixtures. Exhibit “A,” at 2, ¶ 2. (Emphasis added.)

6. The First Amended Complaint alleges that the site is comprised of 1,856 acres of real property located at 200 North Repauno Avenue, Gibbstown, Greenwich Township, Gloucester County, New Jersey (“Repauno” or “Site”). *Id.* at 14, ¶ 58.

7. Plaintiffs aver that during World War I, DuPont plants produced explosives at Repauno to support the United States government’s demand for ammunition. *Id.* at 15, ¶ 63.

8. Plaintiffs’ First Amended Complaint further alleges that in 1917, DuPont expanded its operations to produce nitrobenzene, aniline, and diphenylamine. *Id.* at 16, ¶ 64.

9. Plaintiffs’ further state that during World War II, DuPont again expanded its explosives production to manufacture Nitramon®, Amatol, pentaerythritol tetranitrate, trinitrotoluene, hexite, and tetryl. *Id.* at 16, ¶ 65.

10. Plaintiffs’ First Amended Complaint seek costs and damages for injuries to natural resources of the State, including to the surface water, groundwater, sediments, wetlands, air, soil, ecological resources, biota and the public fisc, resulting from Defendants’ discharges of hazardous substances and pollutants at and from the Repauno site. *Id.* ¶ 3.

11. Throughout the World War I and World War II period, DuPont entered into numerous contracts with the United States for the manufacturing of chemical compounds to be produced at Repauno and to be used by the United States and its Allies to support the war effort.

12. These government contracts, as described below, compelled DuPont to vastly increase the volume of chemical compounds manufactured at Repauno. The manufacture of these chemical compounds necessarily resulted in air and water discharges inherently associated with DuPont's manufacturing processes. Plaintiffs now claim that these discharges must be remediated by DuPont and the other Defendants, and they also request natural resource damages stemming from these emissions.

13. On September 18, 1918, the War Department of the United States of America issued Procurement Order No. P15109-1425E ("Procurement Order"), which requested that DuPont produce 82,500 lbs. of diphenylamine at its Gibbstown, New Jersey Plant [the Repauno Site].

14. The Procurement Order sets forth precise specifications for the production of the diphenylamine.

15. The terms of the Procurement Order were memorialized in a formal contract between DuPont and the United States of America, by Colonel, Ordinance Department of the United States Army dated September 18, 1918.

16. On January 30, 1942, DuPont and the United States of America contracted for the production of 360,000 lbs. of diphenylamine to be manufactured at the Repauno Works site.

17. Contract W-670-ORD-177 provided specifications to which DuPont must manufacture the diphenylamine, and mandated a delivery schedule.

18. On March 30, 1942, DuPont and the United States of America entered into a supply contract, No. W-670-ORD-248, for the manufacture of 251,600 lbs. of Pentolite, Dry (50-50) to be manufactured at the Repauno Works site.

19. The government contract provided specifications to which DuPont must manufacture the Pentolite, Dry (50-50), and mandated a delivery schedule.

20. On May 6, 1942, DuPont entered into a supply contract No. W-670-ORD-2271 with the United States of America for the production of an additional 224,000 lbs. of diphenylamine to be manufactured at the Repauno Works site.

21. Contract No. W-670-ORD-2271 provided specifications and drawings which DuPont agreed to strictly adhere to for the production of diphenylamine.

22. As further explained below, this case is properly removed to this Court pursuant to 28 U.S.C. § 1442(a)(1) because Plaintiffs bring claims for or relating to actions that occurred while DuPont was acting under a federal officer or agency.

## **II. REMOVAL IS PROPER BECAUSE THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1442(a).**

23. This Court has subject matter jurisdiction under 28 U.S.C. § 1442(a) because this is a suit against a “person acting under [an] officer[] of the United States or of any agency thereof . . . for or relating to an[] act under color of such office.”

24. “Unlike the general removal statute, the federal officer removal statute [Section 1442(a)] is to be ‘broadly construed’ in favor of a federal forum.” Papp v. Fore-Kast Sales Co., 842 F.3d 805, 811 (3d Cir. 2016).

25. The case is removable pursuant to Section 1442(a) because “(1) [DuPont] is a ‘person’ within the meaning of the statute; (2) the plaintiffs’ claims are based upon [DuPont’s] conduct ‘acting under’ the United States, its agencies, or its officers; (3) the plaintiffs’ claims against [DuPont] are ‘for, or relating to’ an act under color of federal office; and (4) [DuPont] raises a colorable federal defense to the plaintiff’s claims.” Papp, 842 F.3d at 812 (brackets omitted).

**A. DuPont is a “Person” Under 28 U.S.C. § 1442(a)**

26. DuPont is a corporate entity, and corporations are “person[s]” pursuant to Section 1442(a)(1). Papp, 842 F.3d at 812 (for purposes of Section 1442(a), “a corporation[] is in legal fact a person” (citing 1 U.S.C. § 1)).

**B. Plaintiffs’ Claims Are Based on DuPont’s Conduct While “Acting Under” the United States**

27. The “acting under” requirement, like the federal removal statute overall, is to be “liberally construe[d]” to cover actions that involve “an effort to assist, or to help carry out, the federal supervisor’s duties or tasks.” Ruppel v. CBS Corp., 701 F.3d 1176, 1181 (7th Cir. 2012)(quoting Watson v. Philip Morris Cos., Inc., 551 U.S. 142 (2007)); see also Defender Ass’n, 790 F.3d 457, 468 (2015).

28. Although the Supreme Court has not precisely determined “whether and when particular circumstances may enable private contractors to invoke the statute,” it has noted with approval that “lower courts have held that Government contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision.” Watson at 153-154.

29. The classic case of government assistance as it relates to government contractors is when “the private contractor acted under a federal officer or agency because the contractors ‘help[ed] the Government to produce an item that it need[ed].’” Defender Ass’n, 790 F.3d at 468 (quoting Watson, 551 U.S. at 153, 127 S.Ct. 2301). When “the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete,” that contractor is “acting under” the authority of a federal officer. Ruppel, 701 F.3d at 1181; see also Defender Ass’n, 790 F.3d at 468–70.

30. Here, DuPont was acting under the United States government when it performed pursuant to government contracts including but not limited to, Procurement Order No. P15109-1425E and Contract Nos. W-670-ORD-177, W-670-ORD-248, and W-670-ORD-2271 (“Repauno Contracts”) to produce chemicals including but not limited to Diphenylamine and Pentolite, Dry (50-50) (“Chemical Compounds”) to make ammunition and other products required by the government for the war effort.

31. DuPont was acting under the supervision of the United States government at Repauno as the Repauno Contracts contain provisions which dictate the government specifications that DuPont was required to follow in manufacturing each chemical compound.

32. Moreover, DuPont’s contractual relationship with the government fits the classic government assistance scenario as the Repauno Contracts required DuPont to work for the government by producing Chemical Compounds that the government needed to advance the war effort.

33. Thus, DuPont was acting under government supervision at Repauno in manufacturing the Chemical Compounds as DuPont’s production was done pursuant to government specifications, and DuPont was producing the Chemical Compounds to assist the government with products that they needed during a time of war.

**C. Plaintiffs’ Claims against DuPont Are “For, or Relating To” Acts under Color of Federal Office**

34. The next requirement, often referred to as the “nexus” or “causation” requirement, demands that the alleged conduct have been undertaken “for or relating to” a federal office. To meet this requirement, “it is sufficient for there to be a connection or association between the act in question and the federal office.” Defender Ass’n, 790 F.3d at 471.

35. In the matter at bar, Plaintiffs allege that since 1880, DuPont has engaged in the manufacture, storage, and transport of industrial chemicals and high explosive products at the Repauno site; and as a result, DuPont has generated a diverse and significant amount of hazardous waste at Repauno. Exhibit “A,” at 2, ¶ 2. (Emphasis added.)

36. As demonstrated by the Repauno Contracts, in the 1900s, DuPont was producing and utilizing hazardous substances at Repauno as ordered by the United States government.

37. Therefore, the “for or relating to” prong is satisfied because the production of hazardous substances ordered by the government at Repauno makes up a significant portion of Plaintiffs’ alleged harm.

#### **D. DuPont Has A Colorable Federal Defense to Plaintiffs’ Claims**

38. “At the removal stage,” DuPont need “only show” that a federal defense is “legitimate and could reasonably be asserted, given the facts presented and the current law.” Papp, 842 F.3d at 815 (brackets omitted).

39. DuPont is immune from Plaintiffs’ state tort claims<sup>1</sup> based on the government contractor defense as articulated in Boyle v. United Technologies Corp., 487 U.S. 500 (1988) which stated that the “uniquely federal interest” of “getting the Government's work done” requires that under certain circumstances, a private contractor must be protected from tort liability associated with its performance of a government procurement contract. Id. at 504–05. The Boyle Court held that federal interests preempt state law duties and immunize defendants when “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the

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<sup>1</sup> Plaintiffs’ Complaint alleges the following state tort claims against DuPont: Public Nuisance, Trespass, and Negligence. Exhibit “A” at 52 – 63, ¶¶ 170 – 193.



dangers in the use of the equipment that were known to the supplier but not to the United States.” Id. at 512.

40. Given Plaintiffs’ allegations, namely, that DuPont is liable in tort due to its manufacture, storage and transport of hazardous materials since 1880 at Repauno, and considering that the Repauno Contracts required DuPont to produce hazardous materials in the relevant timeframe, it is reasonable for DuPont to assert the government contractor defense articulated in Boyle, supra. See New Jersey D.E.P. v. Exxon Mobil Corp., 381 F.Supp.2d 398, 404 (2008) (finding that Defendant’s government contractor defense was colorable where certain of its production activities during World War II were under the control of the federal government).

### **III. DUPONT SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.**

41. DuPont files this Notice of Removal “together with a copy of all process, pleadings, and orders served upon such defendant or defendants” during the state-court proceedings as Exhibit “B.” See 28 U.S.C. § 1446(a).

42. This Court is the United States District Court for the district and division embracing the place where the state court complaint was filed. As such, it is the appropriate venue for removal. See 28 U.S.C. § 1446(a).

43. This Notice of Removal is timely as a named defendant’s time to remove is triggered by [the] simultaneous service of the summons and complaint ... not by mere receipt of the complaint unattended by any formal service. Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 119 S.Ct. 1322, 1324 (1999).

44. On June 10, 2019, Plaintiffs served DuPont with a Summons and First Amended Complaint.

45. Thus, this Notice of Removal has been filed timely as, consistent with 28 U.S.C. § 1446(b), it has been “filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading.”

46. No previous application has been made for the relief requested herein.

47. Pursuant to 28 U.S.C. § 1446(d), DuPont will promptly serve written notice of this Notice of Removal upon counsel for Plaintiff and file a copy of this Notice of Removal with the Clerk of the New Jersey Superior Court.

48. If there are any questions concerning this removal, DuPont respectfully requests the opportunity to present briefing and oral argument in support of removal.

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Dated: July 5, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of July, 2019, I caused true and correct copies of the Notice of Removal and exhibits, Civil Cover Sheet, the Notice to the Clerk of the Superior Court of the Filing of the Notice of Removal, Rule 7.1 Corporate Disclosure Statements, and Statement of Filing and Service of Removal to be served via electronic delivery and United States Postal Service Priority Mail upon the following counsel:

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